

**THIS DISPOSITION IS NOT
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re David W. Knight

Serial No. 76/236,769

John S. Egbert of Harrison & Egbert for David W. Knight.

Gene V.J. Maciol, II, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Cissel, Chapman and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

David W. Knight seeks registration on the Principal
Register for the mark BADSLAB for services recited as
"structural repair of buildings, namely, repair in the
field of concrete slabs and foundations; consultation in
the field of structural repair of buildings, namely, repair
in the field of concrete slabs and foundations," in
International Class 37.¹

¹ Application Serial No. 76/236,769 was filed on April 9,
2001 based upon applicant's allegation of a *bona fide* intention
to use the mark in commerce.

This case is now before the Board on appeal from the final refusal to register on the ground that the term BADSLAB is merely descriptive of applicant's services under Section 2(e)(1) of the Lanham Act, 15 U.S.C. §1052(e)(1).

Both applicant and the Trademark Examining Attorney have fully briefed the case. Applicant did not request an oral hearing before the Board.

We affirm the refusal to register.

A mark is merely descriptive, and therefore unregistrable pursuant to the provisions of Section 2(e)(1) of the Trademark Act, if it immediately conveys knowledge of significant ingredients, qualities, characteristics, features, functions, purposes or uses of the goods or services with which it is used or is intended to be used. A mark is suggestive, and therefore registrable on the Principal Register without a showing of acquired distinctiveness, if imagination, thought or perception is required to reach a conclusion on the nature of the goods or services. See In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). The question of whether a particular term is merely descriptive must be determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which the mark is used or is intended to be used, and the

significance that the mark is likely to have on the average purchaser encountering the services in the marketplace.

See In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978); and In re Engineering Systems Corp., 2 USPQ2d 1075 (TTAB 1986).

Applicant argues that its service mark may be suggestive, but that is not merely descriptive. According to applicant, potential consumers would have to use some imagination or thought in order to understand readily the nature of these unique services being offered by applicant in connection with this mark. Applicant also notes that the absence of any evidence of third-party usage of this term in conjunction with the applicable services also supports a reversal of the refusal made by the Trademark Examining Attorney.

It is the Trademark Examining Attorney's position that BADSLAB is not suggestive, but rather, that it immediately tells consumers that the applicant's "services are provided to repair a 'BadSlab.'" (Trademark Examining Attorney's appeal brief, p. 6).

The Trademark Examining Attorney has placed into the record a number of definitions of the word "slab" drawn from specialized dictionaries. They consistently refer to a horizontal layer of concrete, usually on the ground, but

sometimes as part of a roof structure.² The Trademark Examining Attorney also introduced into the record a number of excerpted stories retrieved from the LEXIS/NEXIS database and from Internet searches demonstrating that the term "bad slab" is a readily-understood reference to a defective concrete slab. While the meaning remains consistent, we note that the setting varies somewhat from the foundation of a building to a section of highway or sidewalk (search term was already highlighted in NEXIS stories, but emphasis was supplied to Internet excerpts):

Panel Replacement Offers Promise in Pavement Repair

The problem is all too common. A section of concrete pavement on a busy urban freeway wears out and needs to be replaced.

...

How tough can it be to pull the **bad slab** out and lower the new one into place?

"It's not as simple as it might sound," according to Brannon....³

Campion Rodolff LLP

The Law in Review

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² slab. 1. A cast concrete floor. 2. Flat section of floor or roof either on the ground or supported by beams or walls. Construction Dictionary Illustrated, BNi Building News ©2001;

slab (1) A flat, horizontal (or nearly horizontal) molded layer of plain or reinforced concrete, usually of uniform but sometimes of variable thickness, positioned either on the ground or supported by beams, columns, walls, or other framework. Means Illustrated Construction Dictionary, (3rd Ed. 2001);

slab 1. A thin flat piece of concrete or stone. 2. A concrete slab forming a floor. Illustrated Dictionary of Building. © Construction Press 1982.

³ <http://www.dot.ca.gov/ctnews/july02/>

Supplier Liable for **Bad Slab**

The slab underneath the typical Southern California house is made of concrete, and the concrete is made of water, sand, gravel and Portland cement mixed together thoroughly. If the slab cracks, the house may, too, and then the floors tilt and the windows no longer close. No one would be surprised if the owner of a cracked home sued the builder for damages...

Reversing a trial court, the appellate court held that a group of homeowners at a housing development can sue, for strict products liability, the maker of a plastic additive for concrete known as Fibermesh that was used in place of welded wire in their homes' slabs...⁴

**Charter Township of Canton
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... Mr. Pantaleo has two slabs to replace and feels only one is legitimate. When the **bad slab** is replaced the other slab will then become okay...⁵

Anyone wishing to replace **bad slabs** should call engineering technician Larry Aldridge weekdays between 8 a.m. and 5 p.m. EDT...⁶

[Paseo del Norte contractor is] ... replacing several **bad slabs** of concrete pavement at no expense to the city or taxpayers...⁷

"They've got water surface cracks," he says. "There's nothing structurally wrong with it. The only way to tell if that thing is structurally sound or not is to pop a core sample out of the slab. No one can go and look at a slab and tell you it's a **bad slab**. There's no way."⁸

⁴ <http://www.campionrodolff.com/news0501.htm>

⁵ <http://216.239.37.104/search?q=cache:334wrlqazQkJ:www.canton-mi.org/Clerk/images/2002bt/btm072302.pdf+%22bad+slab%22+-linux+-magic&hl=en&ie=UTF-8>

⁶ South Bend Tribune, April 17, 2002.

⁷ Albuquerque Journal, July 17, 2001.

⁸ Houston Press, May 18, 2000.

Besides, PennDOT already had one crack at the area two years ago. A contractor replaced concrete slabs at the south end of the Glenwood Bridge in checkerboard fashion, ignoring many **bad slabs** ...⁹

Route 22 construction ... could be completed next summer if PennDOT does this as all the other parts of Route 22 were done years ago. Tear out some **bad slabs**, then resurface and put the "Jersey barrier" in the middle.¹⁰

The recited services herein involve structural repair of concrete slabs and foundations. Hence, the only issue before us, and the point on which the Trademark Examining Attorney and applicant disagree, is applying the existing case law to these agreed-upon facts. Specifically, if applicant's services are focused on the repair of defective concrete slabs, and "bad slab" is understood to refer to a defective concrete slab, does BADSLAB¹¹ describe a significant feature, purpose or use of applicant's services? Answering this question in the negative, applicant argues as follows:

... The Applicant's services are not for creating a "Bad Slab". Applicant argues that if the mark was "GOODSLAB", then the Examiner's arguments would be more on point due to the fact that the services of the Applicant would be for making a slab "good",

⁹ Pittsburgh Post-Gazette, January 9, 2000.

¹⁰ The Morning Call (Allentown), December 8, 1997.

¹¹ We note that the elimination of the space between the words "BAD" and "SLAB" in the mark as presented in the drawing does not change the significance of the term, which is still recognizable as the term "bad slab" (or "BadSlab").

but as stated, the Examiner has rendered an incorrect analysis of the descriptiveness of this mark...

(Applicant's appeal brief, p. 8).

In response, the Trademark Examining Attorney argues as follows:

... What is the purpose of applicant's repair services? The purpose is to repair a "BadSlab", not repair a "GoodSlab." Thus, the mark merely describes that the repair and repair consultations are concerning "Badslabs." Arguably, "Good Slab" is not merely descriptive of the applicant's proposed services because the specific services are that of repair. One does not repair what is not defective; one does not repair a "GoodSlab." ...[T]he question is whether "BadSlab" immediately describes the purpose and use of the applicant's services. The answer is yes, because the applicant offers construction repair and construction repair consultation pertaining to "BadSlabs."

(Trademark Examining Attorney's appeal brief, p. 7).

On the record adduced, we are convinced that the term "bad slab," in its common meaning, would be understood to describe a primary reason for applicant's services. Undeniably, a key feature of applicant's services is repairing bad slabs of concrete.

In reviewing applicant's position herein, it seems that applicant has attempted to obfuscate the issue before us by urging that the truly descriptive analogue to its allegedly distinctive mark would be "GOODSLAB" because

applicant's repairs are undertaken to make a concrete slab "good." We do not find this argument to be logically compelling. Furthermore, we do not find applicant's position to be consistent with reported decisions. For example, the Board reasoned as follows:

There remains to consider ... whether "UNCLAIMED SALVAGE & FREIGHT CO." is merely descriptive of applicant's services. According to the last cited advertisement, applicant " ... is a unique chain of warehouse outlets who buy their merchandise from railroad salvage, insurance claims, bankrupt businesses, factory overruns and make bulk purchases of surplus merchandise for liquidation" There is no question from this description of applicant's activities that it is a company that deals in salvage and freight and while applicant has attempted to obfuscate the issue before us by urging that the goods are not "unclaimed" in the usual sense of the term, it is implicit in the term salvage and in the usual disposition of "insurance claims" to offset losses by insurance companies. But, even if "unclaimed" is not an apt term to describe the goods in which applicant deals, it is obvious that the average customer will be likely to believe that applicant's goods are "unclaimed salvage and freight."

In re Unclaimed Salvage & Freight Company, Inc., 192 USPQ 165, 168 (TTAB 1976) [UNCLAIMED SALVAGE & FREIGHT CO. is merely descriptive of applicant's services recited as "retail and distributorship services in the field of salvaged and distressed or damaged merchandise"].

At the heart of this issue, we disagree with applicant as to the degree of imagination, thought or perception required by purchasers and prospective purchasers who first encounter this service mark. We find that purchasers would not be required to rely upon mental gymnastics or complicated logical analysis to understand the descriptive significance of BADSLAB in connection with these services. Rather, in the context of applicant's recited services, the average customer would immediately and unequivocally understand the essential nature of applicant's repair services, namely, that applicant's services are appropriate for the owner of a building that has a "bad slab" of concrete. In re Quik-Print Copy Shop, Inc., 616 F.2d 523, 205 USPQ 505 (CCPA 1980) [QUIK-PRINT is merely descriptive of printing and other related services]; In re The Clausen Company, 222 USPQ 455 (TTAB 1984) [SMOOTHOUT is merely descriptive of a chemical product for reducing the viscosity of auto body filler]; In re Quatomatic, Inc., 185 USPQ 59 (TTAB 1974) [the term STRIPPERS immediately and unequivocally indicates to prospective purchasers that applicant is engaged in stripping or removing paint, varnish or other finishes from wooden and metal surfaces]; and In re G.E. Smith, Inc., 138 USPQ 518 (TTAB 1963) [KOLD KURE applied to foundry core and mold binder compositions

merely describes the intended use of the product because it is an ingredient used in the cold cure process of making cores or molds].

Finally, applicant argues that the absence of any evidence of third-party usage of this term in conjunction with the applicable services is significant. This absence notwithstanding, even if applicant were the first and only user of this merely descriptive designation, refusal under Section 2(e)(1) of the Act would still be appropriate. In re National Shooting Sports Foundation, Inc., 219 USPQ 1018 (TTAB 1983).

Accordingly, we have no doubt but that the term BADSLAB is merely descriptive of applicant's consultation and repair services in the field of concrete slabs and building foundations.

Decision: The refusal to register under Section 2(e)(1) of the Act is affirmed.